Supreme Court, U.S.
FILED
MAY 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

Docket No. 89-1298

THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1989 TERM

INGERSOLL-RAND CO., petitioner

v.

McCLENDON, respondent

APPEAL FROM THE SUPREME COURT OF TEXAS

McCLENDON v. INGERSOLL-RAND CO., NO. C-7973

BRIEF OF AMICUS CURIAE

ON BEHALF OF RESPONDENT

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MAY 31, 1990

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i-vi.
I. THE AMICUS CURIAE'S INTEREST	1.
II. SUMMARY OF ARGUMENT	2.
III. ARGUMENTS	4.
1. A BRIEF HISTORY OF ERISA'S PREEMPTION OF STATE LAW UP TO *RUSSELL* AND *PILOT LIFE*.	4.
2. SOME JUDICIAL REACTIONS TO THE SIMULTANEOUS BROADENING OF ERISA PREEMPTION AND THE NARROWING OF ERISA REMEDIES.	10.
The absorption doctrine.	11.
Remedies for willful violation.	13.
3. ***"Thou shalt deter!"*** THE CONGRESSIONAL REACTION TO THE SIMULTANEOUS BROADENING OF ERISA PREEMPTION AND THE NARROWING OF ERISA REMEDIES.	15.
4. IMPLICATIONS OF *MAKING PARTICIPANTS WHOLE* AND *DETERRENCE* OR WHY A PER DIEM CIVIL PENALTY SHOULD BE THE MONETARY REMEDY OF CHOICE.	22.
IV. CONCLUSION.	26.
CERTIFICATE OF SERVICE	28.

TABLE OF AUTHORITIES

CASES **PAGE**

Alessi v. Raybestos-Manhattan Inc., 451 U.S. 504, at 524-525 (1981) **7.**

Amos v. Blue Cross-Blue Shield of Alabama, 868 F.2d 430 (11th Cir. 1988), *rev'g*, 681 F.Supp.1515 (N.D. Ala. 1988), cert. denied, 110 S. Ct. 158 (1989) **3, 10, 11, 14.**

Anderson v. Pittsburgh-Des Moines Corp., 893 F.2d 638 (3rd Cir. 1990) **19.**

Bd. of Trustees v. Continental Assur. Co., _____ F.Supp. _____, 1988 US Dist Lexis 6307 (W.D. Ark. 1988) **12.**

Blanchard v. Bergeron, 489 U.S. _____, 109 S.Ct. ____, 103 L.E.d.2d 67, at 78 (1989) **20.**

Blau v. Del Monte, 748 F.2d 1348, 1352-53 (9th Cir. 1984) **24.**

Browning-Ferris v. Kelso Disposal, 492 U.S. ____, 106 L.E.d.2d 219, at 239 (1989) **26.**

Bruch v. Firestone Tire and Rubber Co., 489 U.S. _____, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989), *aff'g in part, rev'g in part, and remanding* 828 F. 2d 134 (3rd Cir. 1987) **12.**

Curry v. Contract Fab. Inc. Profit Sharing Plan, 891 F.2d 842, at 847-848 (11th Cir. 1990) **19, 23, 24.**

Daniel v. Eaton Corp., 839 F.2d 263 (6th Cir. 1988), *cert. denied*, ____ U.S. __, 109 S. Ct. 76 (1989) **24.**

Dozsa v. Crum & Forster Insurance Co., 716 F.Supp. 131 (D.C. N.J. 1989) **20.**

Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir. 1981), *cert. denied*, 454 U.S. 968 (1981) **10, 14.**

Drinkwater v. Metropolitian Life Ins. Co., 846 F.2d 821 (1st Cir. 1988) **10, 14.**

Edwards v. State Farm Mut. Ins. Co., 851 F.2d 134, at 137 (6th Cir. 1988) **24.**

Firestone Tire and Rubber Co. v. Bruch, 489 US _____, 103 L. Ed. 2d 80, 109 S. Ct. 948 (February 21, 1989); *affirming in part*, 828 F. 2d 134 (3rd Cir. 1987) **12.**

FMC v. Holliday, 885 F.2d 79, at 88-89 (3rd Cir. 1989) , *cert. granted*, No. 89-1048, ____ U.S. __ (1990) **21.**

Grossmuller v. International Union, U.A.W., 511 F.Supp. 709 (1981) **24.**

Hansen v. Blue Cross of California, 891 F.2d 1384 (9th Cir. 1989) **21.**

Haytcher v ABS Industries, Inc., _____ F.Supp _____, 7 EBC 2158 (N.D. Ohio 1987), *rev'd on other grounds*, 889 F.2d 64 (6th Cir. 1989) **14.**

HealthAmerica v. Menton, 551So.2d 235 (Ala. S. Ct. 1989),*Cert. denied*, No. 89-939, _____ U.S. _____ (February 29, 1990) **7, 20.**

James A. Dooley Assoc. Emp. Ret. Plan v. Reynolds, 654 F. Supp. 457 (E.D. Mo. 1987) **14.**

Jordan v. Reliable Life Ins. Co., 694 F. Supp. 822, at 827 (N.D. Ala. 1988) (Acker, J.) **5, 12, 21.**

Kane v. Aetna Life Ins., 893 F.2d 1283, at 1286 (11th Cir. 1990) **19.**

Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489, at 493 (9th Cir. 1988, *rehearing en banc* 2-2-89) **8, 9, 10, 14.**

Kleinhans v. Lisle Sav. and Profit Sharing Trust, 810 F.2d 618 (7th Cir. 1987) **10, 15.**

Krogh v. Chamberlain, 708 F. Supp. 1235, (D.C. Utah 1989) **19.**

Lambert v. Pacific Mut. Life Ins. Co., 259 Cal. Rptr. 398 (Cal App 1 Dist. 1989) **21.**

Leiding v. Federal Deposit Insurance Corporation, No. 88-C-1567-B (N.D. Okla. December 7, 1989), *appeal pending sub. nom., Leiding v. Brookside State Bank*, No. 89-5078 (10th Cir. 1990) **1, 2, 20.**

Leigh v. Engle, , _____ F.2d __, 10 EBC 104, at 1049 (7th Cir. 1988), *Aff'g*, 669 F.Supp. 1390 (N.D. Ill. 1987) **19.**

Lorenzen v. Emp. Ret. Plan of Sperry & Hutchinson, 896 F.2d 228, at 230 (7th Cir. 1990) **10, 11, 15.**

Massachusetts Mut. Life Ins. Co., v. Russell, 473 U. S. 134, 87 L. Ed. 2d 96, at 110 n.7 and 111 n.10, 105 S. Ct. 3085 (1985) (four Justice dissenting opinion) **8, 12, 13, 22.**

McKinnon v. Blue Cross-Blue Shield of Alabama, 691 F.Supp. 1314 (N.D. Ala. 1988) **10, 20.**

McRae v. Seafarers Welfare Fund, No. 88-5044T, _____ F.Supp. ___, 11 EBC 2274, 1989 US Dist Lexis 14746 (S.D. Ala. December 4, 1989) **3, 14.**

Metropolitan v Massachusetts, 471 U.S. 724, at 747 n.25 (1985) **7, 21.**

Pacific Mut. Life Ins. Co. v. Haslip, 553 So.2d 537, at 543-544 (Ala. S. Ct. 1989), *cert. granted*, No. 89-1279, __ U.S. __, (April 2, 1990) **26.**

Pane v. RCA Corp., 868 F.2d 631 (3rd Cir. 1989) **10, 14.**

Paris v. Profit Sharing Plan of Employees of Howard B. Wolf, Inc., 637 F.2d 357 (5th Cir. 1981) **23.**

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987) **2, 7, 8.**

Powell v. Chesapeake and Potomac Tel. Co., 780 F.2d 419 (4th Cir. 1985) **10, 14.**

Sage v. Automation, Inc. Pension Plan and Trust, 845 F. 2d 885, at 894-895 n.4 (10th Cir. 1988) **10, 14.**

Sandlin v. Iron Workers Dist. Council Plan, 716 F.Supp. 571 (N.D. Ala. 1988) **24.**

Shaw v. Delta Airlines, 463 U.S. 85 (1983) **6.**

Smith v. ABS Industries, Inc., 653 F.Supp. 94 (N.D. Ohio 1986) **14.**

Sokol v. Berstein, 803 F.2d 532 (9th Cir. 1986) **10, 14.**

Sommers Drug Stores v. Corrigan Enterprises, 793 F.2d 1456 (5th Cir. 1986) **10, 14.**

Varhola v. Doe, 820 F.2d 809 (6th Cir. 1987) **10, 14.**

Vogel v. Independence Federal Sav. Bank, 692 F.Supp. 587 (D. Md. 1988), *reh.*, 728 F.Supp. 1210 **3, 14, 15, 19.**

Vogel (II), 728 F.Supp. 1210 (D. Md. 1990) **24.**

Wolfe v. J. C. Penney Co, 710 F.2d 388, at 394 (7th Cir. 1983) **23, 24.**

STATUTES

ERISA §2 [29 USC §1001] **22.**

ERISA §3 [29 USC §1002] **21, 22.**

ERISA §502 [29 USC §1132] **4, 12, 15, 18, 25, 27.**

ERISA §510 [29 USC §1140]. **3.**

ERISA §514 [29 USC §1144]. **6, 7, 21.**

ERISA §§601-608 [29 USC §§1161-1168]. **20.**

Omnibus Budget Reconciliation Act of 1989 (OBRA 1989 or PL 101-239) **7, 13, 15, 16, 18, 20, 21, 22, 23.**

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Case Comment, *BLIND FAITH CONQUERS BAD FAITH: ONLY CONGRESS CAN SAVE US AFTER PILOT LIFE INSURANCE CO. V. DEDEAUX*, 21 LOY. L. A. L. REV. 1343-1401 (June 1988) **6, 14, 19.**

Chittenden, *ERISA Preemption: The Demise of Bad Faith Actions in Group Insurance Cases*, 12 SOUTHERN ILL. UNIV. L. REV. 517-531 (Spring 1988) **6, 14, 19.**

Comment, *Defining the Contours of ERISA Preemption of State Insurance Regulation: Making Employee Benefit Plan Regulation an Exclusively Federal Concern*, 42 VAND. L. REV. 607-638 (1989) **6, 14, 19.**

Comment, *ERISA Preemption of California Tort and Bad Faith Law: What's Left?* 22 U. S. F. L. REV. 519-559 (Winter/Spring 1988) **6, 14, 19.**

120 CONG. REC. 29,197 (1974) (remarks of Rep. Dent) **5.**

135 Cong. Rec., *Conference Report on HR 3299, Omnibus Budget Reconciliation Act of 1989*, November 21, 1989, at H9453-4 and H9603-04 **6, 16, 17, 23.**

Kracov, *Extracontractual Damages under ERISA: Recent Developments Under the Civil Enforcement and Preemption Provisions*, 17, No. 2 BNA Tax Management Compensation Planning Journal, at 23, at 25 (February 3, 1989) **12, 13, 16, 20.**

National Law Journal, at page 6 (April 30, 1990) **25.**

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Statement of Sen. Harrison A. Williams, Jr., *reprinted in* 1974 U.S. CODE CONG. AND ADMIN. NEWS 5177 **6.**

D. Sweetman, *License to do Evil?* Natl L. J., at 13-14 (November 6, 1989) and G. Crovitz, *Absurd Punitive Damages Also "Mock" Due Process*, Wall St. J., at A15 (March 14, 1990) **26.**

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INGERSOLL-RAND CO.,	)	
petitioner	)	
v.	)	Docket No. **89-1298.**
McCLENDON,	)	Brief of Amicus Curiae.
respondent	)	

I. THE AMICUS CURIAE'S INTEREST IN THIS CASE

The amicus curiae has three reasons for his interest in this case.[1] First, he is counsel to a plaintiff/appellant in another case currently pending before the 10th Circuit Court of Appeals in which the issues of ERISA preemption and remedies are determinative.[2] Second, in *Leiding*, the defendants have asked for frivolous filing sanctions against counsel and plaintiff because plaintiff's counsel asked for civil monetary penalties as part of plaintiff's ERISA

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[1] The amicus curiae does not seek oral argument and would agree to oral argument only if requested. Both parties have consented in writing to this amicus curiae brief.

[2] *Leiding v. Federal Deposit Insurance Corporation*, No. 88-C-1567-B (N.D. Okla. March 21, 1990), *appeal docketed, Leiding v. Brookside State Bank*, No. 90-5078 (10th Cir. March 23, 1990) (common law equitable estoppel, monetary civil penalties and Rule 11 sanction issues).

remedies.[3] Third, as an adjunct professor for deferred compensation and employee benefits in the University of Tulsa's Masters in Taxation program, the amicus curiae has spent a great deal of time reviewing ERISA preemption cases. As a result of that study, he has come to believe that since *Pilot Life,*[4] the courts are inadequately protecting aggrieved participants and inadequately deterring violations of ERISA. *Pilot Life* has inhibited the needed development of a federal common law of remedies under ERISA for unreasonable delay or refusal to process bona fide partticipant claims.[5]

II. SUMMARY OF ARGUMENT

The Court should affirm the Texas Supreme Court for the reasons stated in respondent McClendon's brief and by the Texas Supreme Court. However, this case would not be before this Court if there were not a legitimate difference of opinion on the scope of preemption and remedies under ERISA. Thus the Court's duty does not end with a finding of preemption, if that is the Court's decision in this case.

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[3] Application for FCvP Rule 11 sanctions, Record entry #118 *Leiding v. Federal Deposit Insurance Corporation*, No. 88-C-1567-B (N.D. Okla. December 7, 1989), *cross-appeal docketed*, No. 90-5090 (10th Cir. April 12, 1990) (monetary civil penalties for violation of ERISA and other Rule 11 sanction issues).

[4] *Pilot Life Insurance Co. v. Dedeaux*. 481 U.S. 41 (1987).

[5] The views expressed in this brief are those of the amicus curiae. The amicuscuriae in no way means to imply that these views are also those of the University of Tulsa or anyone else affiliated with the University of Tulsa.

Assuming preemption, the Court should hold that, regardless of the labels used by the state court, this state court decision is consistent with the recent trend of federal district court decisions under ERISA §510 [29 USC §1140] for willful violations of ERISA, e.g., *Vogel v. Independence Federal Sav. Bank*,[6] and *McRae v. Seafarers Welfare Fund*.[7] To adequately protect participants, McClendon's state law cause of action should also be absorbed into federal common law under ERISA as was the case in the *Amos*[8] district court decision. Thus the Texas Supreme Court decision should be affirmed. Ingersoll-Rand did not suffer prejudice. The same result would have occurred under federal law.

Alternatively, rather than simply reversing if the Court disagrees with the reasoning of *Amos*, *Vogel*, and *McRae*, the Court should consider the extensive and generally negative feedback its *Pilot Life* decision has received in the lower federal courts, in Congress, and in scholarly legal publications. To be blunt, this Court is not allowing ERISA to fulfil its most basic function. The

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[6] *Vogel*, 692 F.Supp. 587 (1988).

[7] *McRae*, No. 88-0544T, _____ F.Supp. _____ 11 EBC 2274 (D.C. S. Ala. 1989) (Relied on *Russell* concurring opinion to find $50,000 in extracontractual damages for delays in processing a participant's claim for approximately $7,000 in unpaid medical services. The Court found extreme aggravation, humiliation and a ruined credit rating).

[8] *Amos v. Blue Cross-Blue Shield of Alabama*, 681 F.Supp. 1515 (N.D. Ala. 1988), *rev'd* 868 F.2d 430 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 158 (1990).

experience since *Pilot Life* demonstrates that plan participants are not adequately protected when *Pilot Life* is interpreted to stop the development of a federal common law of remedies for ERISA. *Pilot Life*, as applied by the federal appellate courts, neither protects plan participants nor deters similar violations of ERISA when a legitimate benefit entitlement has been totally disregarded by the employer or where the processing of a legitimate benefit claim has been unreasonably delayed by the plan fiduciary.

To adequately protect aggrieved plan participants, the Court should consider some civil penalty as a remedy which can be both easily administered by a trial court and is not unduly burdensome to employers. A per diem civil penalty like that of ERISA §502(c)(1) [29 USC §1132(c)(1)] meets these two criteria. A per diem penalty also provides deterrence to other potential violations of ERISA and restores the balance for protection of aggrieved plan participants.

On remand, the Court should suggest that the Texas courts consider a per diem civil penalty if it preempts McClendon's state law claim and also rejects the reasoning of *Amos* on *absorption* of state law claims or *Vogel* and *McRae* on willful violations of ERISA.

III. ARGUMENT

I. A BRIEF HISTORY OF ERISA'S PREEMPTION OF STATE LAW UP TO *RUSSELL* AND *PILOT LIFE*.

> *The ERISA quicksand is fast swallowing up everything that steps in it or near it. Jordan v. Reliable Life Ins. Co.*, (Acker, J.).[9]

The United States has two major systems for determining substantive rights for employer-provided benefits and remedies for violation of those substantive rights. Traditionally, state law governed these rights and remedies. Such state law was based on statute, common law, equity or administrative regulation. In 1974, a comprehensive federal regulatory program, ERISA, was enacted for governing many of the same employee benefit plans previously governed by state law.

Preemption of much of the pre-existing state law applicable to employee benefit plans was a major objective of Congress when it passed ERISA. Representative John A. Dent, House sponsor of ERISA, stated that "the reservation to Federal authority the *sole* power to regulate the field of employee benefit plans" is the statute's "crowning achievement."[10] "It should be stressed," stated Senator Harrison A. Williams, Chairman of the Senate Labor & Public Welfare Committee, upon introduction of the ERISA Conference Report, "that with the narrow exceptions specified in the bill, the substantive and enforcement provisions [of ERISA] are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting

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[9] *Jordan*, 694 F. Supp. 822, at 827 (N.D. Ala. 1988).

[10] 120 CONG. REC. 29,197 (1974) (remarks of Rep. Dent) (*emphasis added*).

or inconsistent State or local regulation of employee benefit plans."[11]

Judge Acker summed up the reach of ERISA preemption in one sentence. It is broad--very broad. The learned writers in Law Reviews and Journals are in agreement.[12] At least until OBRA 1989,[13] there was a dramatic difference in outcomes depending on whether or not a participant's state law claim was preempted under ERISA. For instance in *HealthAmerica v. Menton*, the

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[11] Statement of Sen. Harrison A. Williams, Jr., reprinted in 1974 U.S. CODE CONG. AND ADMIN. NEWS 5177.

[12] Comment, *ERISA Preemption of California Tort and Bad Faith Law: What's Left?* 22 U. S. F. L. REV. 519-559 (Winter/Spring 1988); Note, *ERISA-Preemption-Pilot Life Insurance Co. v. Dedeaux: CONGRESS'S CUE TO REASSESS ERISA'S PREEMPTIVE EFFECT*, 36 U. KAN. L. REV. 611-625 (1988); Case Comment, *BLIND FAITH CONQUERS BAD FAITH: ONLY CONGRESS CAN SAVE US AFTER PILOT LIFE INSURANCE CO. V. DEDEAUX*, 21 LOY. L. A. L. REV. 1343-1401 (June 1988); Comment, *Defining the Contours of ERISA Preemption of State Insurance Regulation: Making Employee Benefit Plan Regulation an Exclusively Federal Concern*, 42 VAND. L. REV. 607-638 (1989); Chittenden, *ERISA Preemption: The Demise of Bad Faith Actions in Group Insurance Cases*, 12 SOUTHERN ILL. UNIV. L. REV. 517-531 (Spring 1988); Bishop and Denney, HELLO ERISA, GOOD-BYE BAD FAITH: FEDERAL PRE-EMPTION OF DTPA, INSURANCE CODE, AND COMMON LAW BAD FAITH CLAIMS, 41 Baylor L. Rev. 269-289 (1989).

[13] 135 Cong. Rec., *Conference Report on HR 3299, Omnibus Budget Reconciliation Act of 1989*, November 21, 1989 ("P.L. 101-239" or "OBRA 1989").

difference was worth $1,797,588, the punitive damage amount awarded.[14]

In its several opportunities to address the scope of ERISA preemption under ERISA §514(a), the U. S. Supreme Court has opted for broad preemption.[15] The U. S. Supreme Court addressed the scope of the insurance law preemption exception in first in *Metropolitan Life Insurance Co. v. Massachusetts*[16] and later in *Pilot Life*.

In *Pilot Life*, the plaintiff brought suit asserting the state law tort of bad faith and breach of contract for failure to pay benefits under a group insurance policy. In a unanimous opinion, the U. S. Supreme Court reversed the 5th Circuit Court of Appeals and held that the plaintiff was not saved from preemption by the insurance savings clause, ERISA §514(b)(2)(A) [29 USC §1144(b)(2)(A)].[17] The *Pilot Life* Court held that the plaintiff's Mississippi common law bad faith action was preempted because it was not a state law that regulates insurance.[18]

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[14] *HealthAmerica v. Menton*, 551So.2d 235 (Ala. S. Ct. 1989) (under *Russell/Pilot Life* precedents, the most the *HealthAmerica* plaintiff would have gotten was $2,412 in plan benefits and part or all of his attorney fees), *cert. denied*, No. 89-939, _____ U.S. _____ (February 29, 1990).

[15] *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504, at 524-525 (1981); *Shaw v. Delta Airlines*, 463 U.S. 85 (1983).

[16] *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985).

[17] *Pilot Life*, 481 U.S. 41, at 57 (1987).

[18] Id. at 51.

It is at this point that Congress, in OBRA 1989, parted company with the Supreme Court. The Court went on to reenforce its initial *Metropolitan Life v. Massachusetts* preemption analysis with dicta[19] concerning the civil enforcement remedies of ERISA. The *Pilot Life* Court used the dicta in five (5) justice majority opinion in *Massachusetts Mut. Life Ins. Co. v. Russell*,[20] to state that the explicit statutory ERISA civil enforcement provisions were the exclusive and sole vehicles for the enforcement of employee benefit rights and obligations.

In *Pilot Life*, Justice O'Connor's unanimous opinion quoted language from the *Russell* majority opinion to state that the "six carefully integrated" civil enforcement provisions provided "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." Justice O'Connor concluded:[21]

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive. This conclusion is fully confirmed by the legislative history of the civil enforcement provision.

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[19] Some courts treat the second half of *Pilot Life* as an alternative holding. *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489, at 494 (9th Cir. 1988), *cert. denied*, No. 88-1659, 57 U.S.L.W. 3841 (1989).

[20] *Russell*, 473 U. S. 134, at 146(1985) (J. Stevens for five (5) Justice majority). In *Russell*, the disagreement of the majority opinion with the four (4) justice concurring opinion, was over the majority's dicta which stated that the civil enforcement provisions found in ERISA §502 were the individual participant's *exclusive* remedies and that the six §502 remedies did not include *"legal"* remedies such as punitive damages.

[21] *Pilot Life*, 481 U.S. 41, 107 S. Ct. 1549, at 1556-57 (1987).

The 9th Circuit, in *Kanne v. Connecticut General Life*,[22] completed the cycle. On rehearing, the 9th Circuit was faced with a plan participant who based his cause of action on a provision in the California Insurance Code, §790.03(h)(2). The *Kanne* Court assumed "without deciding" that the plaintiff's statutory cause of action was "a law regulating insurance under the savings clause."[23] The 9th Circuit nevertheless decided that plaintiff's statutory cause of action was preempted because the remedy available to plaintiff for his cause of action would conflict with the ERISA remedies which *Pilot Life* had determined were the exclusive civil enforcement vehicles for individual participants.[24] Therefore the *Kanne* plaintiff was not entitled to extracontractual damages otherwise available for §790.03(h)(2).

In summary, the federal appellate courts and many federal district courts view the combination of *Russell* and *Pilot Life* as both a broadening of ERISA preemption and a restriction on their flexibility in devising remedies for failure to promptly process or pay claims under an ERISA plan. It is not surprising that the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuit Courts of Appeal have barred

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[22] *Kanne*, 867 F.2d 489 (9th Cir. 1988).

[23] *Kanne*, 867 F.2d 489, at 493.

[24] *Kanne*, 867 F.2d 489, at 494.

extracontractual damages or have interpreted *Russell* and *Pilot Life* as barring extracontractual damages in ERISA actions of participants.[25]

2. SOME JUDICIAL REACTIONS TO THE SIMULTANEOUS BROADENING OF ERISA PREEMPTION AND THE NARROWING OF ERISA REMEDIES.

Notwithstanding the numerous federal court opinions prohibiting extracontractual and punitive damages, the courts have not been pleased with the result in practice. The trial court in *McKinnon v. Blue Cross-Blue Shield of Alabama*, found that the denial of punitive damages *"no matter how egregious the breach of fiduciary obligation"* was *"strangely inconsistent"* with the *"central policy goal of ERISA"* which *"is to protect the interests of employees and their beneficiaries in employee benefit plans."*[26]

The absorption doctrine: The 11th Circuit's decision in *Amos v. Blue Cross-Blue Shield of Alabama*[27] is an example of a court which disagreed with the *Russell/Pilot Life* precedents but followed what it believed to be this Court's position nevertheless. The district court had applied an *"absorption"* theory to incorporate state law actions into ERISA. According to the district court, Congress provided authority for *absorption* in the direction to the federal courts to develop a federal common law of employee benefits. The 11th Circuit reversed the *Amos* district court stating:[28]

> Accordingly, we are compelled by controlling precedent to reverse the judgment of the district court. We acknowledge that *by eliminating the possibility that insurance companies may be liable for punitive or extracontractual damages, the courts are removing an historical disincentive to insurance company misbehavior.* Consequently, our decision may produce unintended results. However, *any change in the law's course will have to be charted by the Congress or the Supreme Court.*

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25 *Drinkwater v. Metropolitian Life Ins. Co.*, 846 F.2d 821 (1st Cir. 1988); *Pane v. RCA Corp.*, 868 F.2d 631 (3rd Cir. 1989); *Powell v. Chesapeake and Potomac Tel. Co.*, 780 F.2d 419 (4th Cir. 1985); *Sommers Drug Stores v. Corrigan Enterprises*, 793 F.2d 1456 (5th Cir. 1986); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), *cert. denied*, 454 U.S. 968 (1981); *Sokol v. Berstein*, 803 F.2d 532 (9th Cir. 1986); *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988); and *Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430 (11th Cir. 1988), *cert. denied*, 110 S. Ct. 158 (1989); *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, at 888 n.2 (10th Cir. 1988) (The 10th Circuit's position is not entirely clear because at 888 n.2, the court appears to disapprove punitive damages in ERISA cases, while at 894 n.4, the court appears to approve imposing civil penalties for a fiduciary's complete indifference to its plan duties). *See also Kleinhans v. Lisle Sav. and Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987); *Contra, Lorenzen v. Emp. Ret. Plan of Sperry & Hutchinson*, 896 F.2d 228, at 230 (7th Cir. 1990) (dicta quoted below indicates willingness to overrule *Kleinhans*).

26 *McKinnon*, 691 F.Supp. 1314, at 1315-16 (N.D. Ala. 1988).
27 *Amos*, 868 F.2d 430, *rev'g*, 681 F.Supp. 515 (N.D. Ala. 1988).
28 *Amos*, 868 F.2d 430, at 433 (*emphasis added*).

In contrast if the *Amos* case had been before the 7th Circuit, the 7th Circuit would have affirmed the district court. As stated by the 7th Circuit in *Lorenzen*:[29]

> ... as the concurring Justices in *Massachusetts Mutual Life Ins. Co. v. Russell,* pointed out, equitable relief, in a case involving a breach of fiduciary obligations, can include monetary payment, such as Mrs. Lorenzen sought in this case. "*Pilot Life* ... by holding that ERISA preempts suits under state tort law ... for improper processing of claims, *strongly implies that such suits can be brought under ERISA; for otherwise there would be a big gap in liability for misconduct* by ERISA-fiduciaries."

The *Amos* district court was a federal district court that had taken Justice Brennan's *Russell* hint to heart in holding extracontractual damages are available to aggrieved plan participants.[30] In Justice Brennan's view, the drafters of ERISA included the phrase "other appropriate equitable relief" in ERISA §502(a)(3) to allow the the federal courts to "fine tune" ERISA's remedial scheme in order to carry out the Congressional mandate to develop a *federal common law* of employee benefit plan rights and remedies.[31] In developing such federal

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[29] *Lorenzen*, 896 F.2d 228, at 230 (7th Cir. 1990) (*emphasis added*).

[30] *See also, Jordan*, 694 F.Supp. 822 (extensive analysis of *absorption* doctrine case law); *Bd. of Trustees v. Continental Assur. Co.*, __ F.Supp. _____, 1988 US Dist Lexis 6307 (W.D. Ark. 1988).

[31] *Russell*, 473 U.S. 134, at 156 (Justice Brennan concurring); *See also*, Kracov, *Extracontractual Damages under ERISA: Recent Developments Under the Civil Enforcement and*

common law, Justice Brennan believed that the courts should consider the monetary damages that can be awarded under state trust law.[32] This was because Justice Brennan believed such trust law remedies may "best effectuate the underlying purpose of ERISA-enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and the promotion of the best interests of participants and beneficiaries."[33] Congress recently echoed Justice Brennan's reasoning in its description of ERISA's remedy structure in the legislative history of OBRA 1989 discussed below.

If this Court decides that McClendon's claim is preempted, it should still affirm the Texas Supreme Court. When federal law recognizes the same claim in ERISA §510 and the same relief under the *absorption* doctrine, Ingersoll-Rand has not suffered any harm in the Texas courts.

Remedies for willful violation of ERISA: The blanket reluctance of the federal courts to find extracontractual

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Preemption Provisions, 17, No. 2 BNA Tax Management Compensation Planning Journal, at 23, at 25 (February 3, 1989) (The author is especially indebted to E. S. Kracov for his analysis of *Russell*, *Pilot Life* and the 1988 Congressional response).

[32] *Russell*, at 153 n.6 and at 157 ns.16-18; *See also Bruch v. Firestone Tire and Rubber Co.*, 489 U.S. _____, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989), *aff'g in part, rev'g in part, and remanding* 828 F. 2d 134 (3rd Cir. 1987) (The Supreme Court's statement in *Bruch*, that trust law applies to ERISA plans further supports Justice Brennan's concurring opinion).

[33] *Russell*, at 158.

damages under ERISA has been breached recently by courts straddling the line between *Russell* and *Pilot Life*.[34] Relying in part on Justice Brennan's concurring opinion in *Russell*, some federal district courts have found a *willful misconduct* exception to the prohibition against extracontractual damages. In *Vogel*, the plan participant alleged a variety of fiduciary violations and actions on the part of the employer, insurer and the insurance agency plan administrator which denied benefits to the participant under an employer-provided health insurance plan.[35] The *Vogel* Court held that "*willful misconduct*" justifies extracontractual damages where health care coverage and benefits are denied to a group health plan participant.

Under ERISA, it is now generally accepted that intentional, willful violation of ERISA will put the defendant plan fiduciary at risk to an award of extracontractual damages, possibly including punitive damages.[36] Recently, for instance, another district court adopted this position in *McRae v. Seafarers' Welfare Plan*.[37] However

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[34] Kracov, *Extracontractual Damages under ERISA*, at 28.

[35] *Vogel*, 692 F.Supp. 587.

[36] *Smith v. ABS Industries, Inc.*, 653 F.Supp. 94 (N.D. Ohio 1986)(punitive damages for willful violation); *accord*, *Haytcher v ABS Industries, Inc.*, _ F.Supp _____, 7 EBC 2158 (N.D. Ohio 1987) (willful violations), *rev'd on other grounds*, 889 F.2d 64 (6th Cir. 1989); *James A. Dooley Assoc. Emp. Ret. Plan v. Reynolds*, 654 F. Supp. 457 (E.D. Mo. 1987) (malicious breach of duty).

[37] *McRae*, No. 88-0544T, _____ F.Supp. _____ 11 EBC 2274 (D.C. S. Ala. 1989) (Relied on *Russell* concurring opinion to find $50,000 in extracontractual damages for delays in processing a

that is not a widely accepted conclusion[38] and even the *Vogel* and *McRae* district courts did not award punitive damages.[39] The 7th Circuit in *Lorenzen*, also recently stated that it also believes extracontractual remedies are available. [40] This is a U-turn for the 7th Circuit which held in 1987 that extracontractual damages were not available for common law claims.[41]

Ingersoll-Rand's decision to terminate McClendon was a willful act. As such, it clearly is capable of coming under the willful violation exception to ERISA under *Vogel*, *McRae* and the other decisions cited above. For this reason, the Texas Supreme Court decision should be affirmed.

3. *"Thou shalt deter!"* THE CONGRESSIONAL REACTION TO THE SIMULTANEOUS BROADENING OF ERISA PREEMPTION AND THE NARROWING OF ERISA REMEDIES.

P.L. 101-239, the *Omnibus Budget Reconciliation Act of 1989* was reported by the Conference Committee and published in the Congressional Record on November 21, 1989. The President signed OBRA 1989 into law on

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participant's claim for approximately $7,000 in unpaid medical services. Participant alleged extreme aggravation, humiliation and a ruined credit rating.).

[38] *See*, supra note 12 and note 25.

[39] *Vogel* , 692 F.Supp. 587, at 596; *McRae*, ___ F. Supp. _____, 11 EBC 2274, at 2279.

[40] *Lorenzen*, 896 F.2d 228, at 230.

[41] *Kleinhans*, 810 F.2d 618.

December 19, 1989. P.L. 101-239 amended ERISA §502 by adding subsection "(l)." Subsection "(l)" expanded the Department of Labor's enforcement authority by allowing the Secretary of Labor to assess a 20% civil penalty for ERISA violations.[42] On its surface there appears to be nothing directed at private ERISA enforcement actions.

It is in the Conference Committee's explanation of ERISA's enforcement policy that Congress takes the federal judiciary to task for failing to "*fashion legal* and equitable remedies that not only protect participants and beneficiaries but *deter violations of the law as well.*"[43] In the Kracov article on new developments in ERISA remedies, the author discussed the committee report of a 1988 bill which was not enacted.[44] That 1988 bill, the *"Miscellaneous ERISA Amendments Act of 1988"* rose from the dead to become part of OBRA 1989. After describing the DOL's lack of resources to fully *detect* and *deter* violations of ERISA, the OBRA 1989 conferees stated that private enforcement actions were essential to fill the gap:[45]

> For these reasons, it has become apparent that the Department must use its enforcement powers more vigorously to make the protection of ERISA meaningful. The conferees believe strengthened civil penalties will

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[42] P.L. 101-239, §2101.

[43] 135 Cong. Rec., *Conference Report on HR 3299, Omnibus Budget Reconciliation Act of 1989*, November 21, 1989, at H9454.

[44] Kracov *Extracontractual Damages under ERISA*, at 23-29.

[45] 135 Cong. Rec., November 21, 1989, at H9454 (*emphasis added*).

> better protect participants and beneficiaries. *The conferees further believe that the need for strengthened enforcement and deterrence of violations of ERISA applies not only to the Department of Labor, but to judicial oversight of private rights of action affecting employee benefit plans.* It remains the intent of Congress that the *courts* use their power of (sic) fashion *legal* and equitable remedies that not only protect participants and beneficiaries but *deter violations of the law as well.* The conferees expect that the executive agencies and the *courts* will use their substantial authority to achieve these goals and to safeguard the rights of plan participants.

Representative Clay, chairman of the Subcommittee on Labor-Management Relations of the House Education and Labor Committee in his extended floor comments stated that this portion of the Conference Committee's Report was aimed at the federal appellate courts overly expansive use of the Supreme Court dicta:[46]

> ... a growing body of Federal common law is developing. These efforts may have suffered an unexpected temporary setback with the Supreme Court's 1987 decision in *Pilot Life Insurance Company v. Dedeaux.* Many are concerned that the effect of this decision preempting State laws authorizing *punitive or other extracontractual damages* in connection with claims for benefits is effectively to deny them legal recourse.
>
> ... Although the Court was correct to hold the State law in question was preempted, it incorrectly construed congressional intent with respect to the creation of a Federal common law of remedies...

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[46] 135 Cong. Rec., November 21, 1989, at H9603-04 (*emphasis added*).

As a practical matter, however, the effect of the decision is to undercut the ability of the courts *to deter willful or negligent misconduct*...

In authorizing the Federal courts to have the flexibility to structure the punishment to fit the violation, the fundamental wisdom of the framers of ERISA is apparent. Congress was right in 1974 to recognize that the courts, not the Congress, could best evaluate the facts and circumstances before them and create remedies that would not only *make participants whole* but also *deter future violations*.

...It is critical that the Secretary of Labor *as well* as *the courts* renew their efforts to safeguard the rights of plan participants *by vigilant and aggressive pursuit of violations and by using every tool they have to create a strong deterrent effect for the future*.

The OBRA 1989 Conference Report interpretation of the legislative history of ERISA's enforcement provisions is also in accord with numerous commentators who have written about *Russell* and *Pilot Life*. Such commentators have almost uniformly condemned the failure of the U. S. Supreme Court to properly balance ERISA policy objectives. Under *Pilot Life*, when a plan administrator unreasonably denies or delays a claim, the only additional cost it bears is the possibility that the plan will bear some portion of the aggrieved participant's legal costs. Because the plan administrator has an opportunity to reduce the participant's fee shift under ERISA §502(g)(1) through a hindsight determination of reasonableness, even the fee shifting statute will not adequately protect participants,[47] especially if the plan administrator's legal tactics contributed to the protracted litigation.[48]

The absence of monetary remedies, such as civil penalties, means a participant's plan interest is inadequately protected.[49] In *Curry v. Contract Fab.*, the plan administrator refused to furnish the pension claim form even after the participant engaged an attorney.[50] In *Kane* and *Anderson*, the plan administrator interpreted the plan to provide the promised benefit or coverage but when it came time to honor its prior interpretation, the plan administrator refused to do so, causing considerable (and probably otherwise noncompensable) injury to the aggrieved participants.[51]

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[47] A case can be made that the discretionary attorney fees award provision in ERISA §502(g)(1) as it currently is used by the courts does not provide a level playing field with respect to well-financed defendant's counsel. *See* Note, *ATTORNEY'S FEES UNDER ERISA: WHEN IS AN AWARD APPROPRIATE?* 71 Cornell L. Rev. 1037-1064, at 1062 (1986) and *generally*, Bartell, *Federal Court Awards of Attorneys' Fees*, II ALI-ABA Civil Practice and Litigation in Federal and State Courts, 1341-1382 (1985, 3rd ed.).

[48] *Leigh v. Engle*, , ____ F.2d __, 10 EBC 104, at 1049 (7th Cir. 1988), *Aff'g*, 669 F.Supp. 1390 (N.D. Ill. 1987) ("Because determination of exact fees incurred is well-nigh impossible ... and because the parties have evidenced an uncanny proclivity for (continued litigation)"); *See also*, *Krogh v. Chamberlain*, 708 F. Supp. 1235, (D.C. Utah 1989) (prevailing COBRA plaintiff denied attorney fees).

[49] *See supra*, note 12.

[50] *Curry v. Contract Fab. Inc. Profit Sharing Plan*, 891 F.2d 842, 844 (11th Cir. 1990) (claim form withheld for nine (9) months after "Curry got himself a lawyer" and for two (2) years before that).

[51] *Kane v. Aetna Life Ins.*, 893 F.2d 1283, at 1286 (11th Cir. 1990) (mental distress over denial of newly adopted child's health care

This especially true in ERISA welfare plans because delay in processing the participant's claim is often life-threatening. A belated and court ordered recognition that a course of treatment is covered by a health care plan is cold comfort to the family of the deceased.[52] In the absence of monetary civil penalties, for instance, all a denied COBRA participant obtains for himself is the right *to pay* for 18 more months of health plan coverage.[53]

This legislation was not slipped into the OBRA 1989 Conference Report in the dark of night by some anonymous staffer.[54] Instead it was a carefully thought out ERISA enforcement policy position of Congress. The House Education and Labor Committee had this policy statement

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coverage); *Anderson v. Pittsburgh-Des Moines Corp.*, 893 F.2d 638 (3rd Cir. 1990) (denial of promised pension).

[52] *Dozsa v. Crum & Forster Insurance Co.*, 716 F.Supp.131, (D.C. N.J. 1989) (cancer treatment known as autologous bone marrow transplant wrongfully refused); *McKinnon v. Blue Cross-Blue Shield of Alabama*, 691 F.Supp. 1314 (N.D. Ala. 1988) (lung cancer surgery claim wrongfully denied); *Vogel v. Independence Federal Sav. Bank*, 692 F.Supp. 587 (D. Md. 1988); *See also*, Appellant's principal brief motion to expedite decision, *Leiding v. Federal Deposit Insurance Corporation, appeal docketed*, No. 89-5078 (10th Cir. April 20, 1990) (participant cannot afford heart operation without COBRA coverage which administrator's prior plan interpretations said was available).

[53] ERISA §601-608 [29 USC §1161-1168].

[54] *Blanchard v. Bergeron*, 489 U.S. ____, 109 S.Ct. ____, 103 L.E.d.2d 67, at 78 (1989) (Justice Scalia, concurring opinion; criticizes letting anonymous Congressional staffers dictate the law of the land to the federal courts).

in gestation for two years[55] and, as Rep. Clay stated, it has been the subject of legislative hearings where interested parties had an opportunity to address the matter before OBRA 1989 was enacted.[56]

In addition, dissatisfaction with this Court's *Pilot Life* decision may be encouraging some courts to deliberately narrow the scope of the ERISA preemption provision in ERISA §514(a) when defining which employee plans are "employee benefit plans" under ERISA §3 [29 USC §1002]. Aggrieved participants then can seek extracontractual damages based on state common law claims because their employee benefit claims are not subject to preemption.[57] There is no "bright-line" minimal contact path to determine

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[55] Kracov *Extracontractual Damages under ERISA*, at 28-29.

[56] The use of the OBRA 1989 legislative oversight position would not be the first time the Courts have used a post-ERISA legislative oversight report to determine the meaning of the original enactment. The U. S. Supreme Court first did this in *Metropolitan v Massachusetts* when it used an oversight committee report to assist in ascertaining the intent of the original ERISA enactment. *See Metropolitan v Massachusetts*, 471 U.S. 724, at 747 n.25 (1985); *FMC v. Holliday*, 885 F.2d 79, at 88-89 (3rd Cir. 1989), *cert. granted*, No. 89-1048, ___ U.S. ___ (1990).

[57] *Jordan*, 694 F.Supp. 822 (sharply criticizes the expansion of the preemption doctrine coupled with limitations on available remedies for fiduciary violations); *HealthAmerica*, 551 So.2d 235 (participant's fraud in the inducement claim against HMO plan was not preempted by ERISA. The Court did not consider the ERISA's disclosure rules, §§102-104, which may conflict with fraud claim, in substance and remedy).

which employee plans are subject to ERISA.[58] Therefore the lack of adequate remedies under federal common law may have the unintended side effect of undermining another important objective of ERISA, complete preemption of state law.

4. IMPLICATIONS OF *MAKING PARTICIPANTS WHOLE* AND *DETERRENCE* OR WHY A PER DIEM CIVIL PENALTY SHOULD BE THE MONETARY REMEDY OF CHOICE.

Making aggrieved participants whole and deterring others does not compelthe wholesale absorption of state common law, either for substantive rights or remedies for violations of those rights. ERISA §§2 and 3 state other objectives Congress had for ERISA. Therefore, if this Court decides that preemption is appropriate and rejects the *Amos* absorption doctrine or the *Vogel/McRae* willful violation exception to the *Pilot Life* dicta, this Court should consider some other alternative which restores the remedial balance that the *Pilot Life* dicta disturbed. This amicus brief proposes a monetary civil penalty proportional to the delay or denial period, a per diem penalty.

Per diem civil penalty for wrongful delay or denial of a valid claim. The *Pilot Life* Court stated that the federal courts must balance the competing interests of

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[58] *Lambert v. Pacific Mut. Life Ins. Co.*, 259 Cal. Rptr. 398 (Cal App 1 Dist. 1989) (application of criteria found in 29 CFR §2510.3-1(j)); *See also Hansen v. Blue Cross of California*, 891 F.2d 1384 (9th Cir. 1989) (extended discussion of preemption and group health care plans).

aggrieved participants against the burdens imposed on employers providing employee benefits.[59] This balancing act has not been repealed. Rather like the scholarly critics, Congress, in OBRA 1989, wants the federal courts to exercise greater flexibility in balancing than the federal courts thought was available after *Pilot Life*.

This amicus brief urges this Court, on any remand, to suggest to the Texas courts that they consider a per diem civil penalty under ERISA's federal common law. A per diem penalty should deter other violations of ERISA[60] while not unduly burdening employers who, in the real world, pay for it all.

Under OBRA 1989, the federal courts have the flexibility to resort to monetary civil penalties to induce private law enforcement and to compensate for noncompensable losses in addition to deterrence of others. The OBRA 1989 Conference Report stated that the Department of Labor's own resources have not kept pace with its responsibility to protect plan participants. Thus the Conference Committee called for "strengthened enforcement and deterrence of violations" in "*private rights of action* affecting employee benefit plans" in which the courts are to "*fashion legal* and equitable remedies."[61]

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[59] *Russell*, 473 U. S. 134, at 148; *Pilot Life*, 481 U.S. 41, at 54.

[60] The trial court's use of its injunctive powers should deter the named defendants.

[61] 135 Cong. Rec., November 21, 1989, at H9454 (col. 1).

Deterrence, especially a strong deterrence, should be necessary to prevent both intentional and inadvertent, but preventable, violations of ERISA.[62] In order to prevent unduly burdening the plan and its fiduciaries, a court should consider adopting the position of the 11th Circuit in *Curry v. Contract Fab. Inc.* In addition to equitable remedies for delay in processing plaintiff's claim, the 11th Circuit affirmed the award of a civil penalty that was "designed" to "teach ERISA fiduciaries a needed lesson".[63] Other courts have recently imposed civil monetary penalties as an alternative to an extracontractual or punitive damage remedy.[64] A per diem penalty functions in the same way as a liquidated damage clause functions in a contract, thus helping to make an aggrieved participant whole from an otherwise non-compensable procedural injury as well as deterring other procedural violations.[65]

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[62] *Paris v. Profit Sharing Plan for Employee of Howard B. Wolf, Inc.*, 637 F.2d 357 (5th Cir. 1981); *Wolfe v. J. C. Penney Co.*, 710 F.2d 388, at 394 (7th Cir. 1983); *Contra, Curry v. Contract Fab. Inc. Profit Sharing Plan*, 891 F.2d 842, 845 and 847 n.10 (11th Cir. 1990).

[63] *Curry*, 891 F.2d 842, 845 and 847 n.10 (monetary civil penalty awarded to plaintiff); *See also, Daniel v. Eaton Corp.*, 839 F.2d 263 (6th Cir. 1988), *cert. denied*, ____ U.S. __, 109 S. Ct. 76 (1989) (the lower court awarded plaintiff $25 per day for the 278 day delay in furnishing requested plan documents).

[64] *Vogel (II)*, 728 F.Supp 1210 (D. Md. 1990); *Sandlin v. Iron Workers Dist. Council Plan*, 716 F.Supp. 571 (N.D. Ala. 1988).

[65] For procedural defect, see *Wolfe v. J. C. Penney Co.*, 710 F.2d 388, at 394; *Grossmuller v. International Union, U.A.W.*, 511 F.Supp. 709 (1981); *Contra, Curry*, 891 F.2d 842, 845 and 847 n.10. For ERISA non-disclosure, see *Paris*, 637 F.2d 357;

If a per diem civil penalty is not the favored remedy, judicial criteria for determining the amount of an award of civil penalties or extracontractual damages will have to be developed by courts no longer bound by their perception of a restriction in *Pilot Life* on the development of common law remedies. Damages for mental distress and other noncompensable losses are hard to assess and thus are not predictable costs to employers.[66] The very unpredictability may discourage employers, in the aggregate, from setting up new plans.

In contrast, the authors of ERISA have already given their seal of approval to per diem civil penalties. ERISA §502(c)(1) [29 USC §1132(c)(1)] imposes a $100 per day penalty for failure to notify COBRA participants and for failure to furnish plan documents. The predictability and liquidated damage nature of a per diem penalty may make it attractive to courts trying to balance ERISA's other goals with corrective action needed for the case at hand. This may be especially true for a federal district court trying to balance the time demands of the new federal criminal

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Contra, Edwards v. State Farm Mut. Ins. Co., 851 F.2d 134, at 137 (6th Cir. 1988) (detrimental reliance and prejudice are not prerequisites to claim on misleading SPD); *See also Blau v. Del Monte*, 748 F.2d 1348, 1352-53 (9th Cir. 1984) (pattern of ERISA violations precluded a procedural remedy from being effective, so substantive remedy awarded).

[66] For instance, the April 30, 1990 National Law Journal reported at page 6 that the Kansas Supreme Court recently affirmed the award of $6.3 million for pain, suffering, and disability including "loss of enjoyment of life."

sentencing guidelines with its civil docket. A per diem civil penalty for the typical wrongful denial or delay in processing actions also avoids the often criticized unpredictability of punitive damage awards in insurance bad faith actions.[67]

IV. CONCLUSION

The Court should affirm the Texas Supreme Court either because there is no preemption by ERISA of McClendon's wrongful discharge claim or because the same result would occur under federal common law. Ingersoll-Rand did not suffer prejudice by the failure to preempt when the Court applies the reasoning of *Amos*, *Vogel*, and *McRae*.

Alternatively, rather than simply reversing if the Court disagrees with the reasoning of *Amos* on *absorption* of state law claims or *Vogel* and *McRae* on willful violations of ERISA, the Court should consider the extensive and

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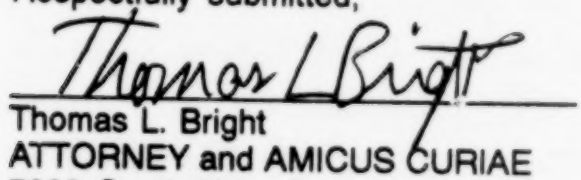
[67] Because this amicus brief urges this Court to favor monetary civil penalties determined on a per diem basis to restore balance to ERISA's remedy structure, the amicus brief does not need to address the increasing willingness of the courts to accept punitive damage awards. For a summary of the controversy over standards for punitive damage amounts, see the opposing viewpoints in: D. Sweetman, *License to do Evil?* Natl L. J., at 13-14 (November 6, 1989) and G. Crovitz, *Absurd Punitive Damages Also "Mock" Due Process*, Wall St. J., at A15 (March 14, 1990); *See also*, *Browning-Ferris v. Kelso Disposal*, 492 U.S. _____, 106 L.E.d.2d 219, at 239 (1989); *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So.2d 537, at 543-544 (Ala. S. Ct. 1989), *cert. granted*, No. 89-1279, _____ U.S. __, (April 2, 1990).

generally negative feedback its *Pilot Life* decision has received in the lower federal courts, in Congress, and in scholarly legal publications. The experience since *Pilot Life* demonstrates that plan participants are not adequately protected when *Pilot Life* is interpreted to stop the development of a federal common law of remedies for ERISA. *Pilot Life*, as applied by the federal appellate courts, does not protect plan participants nor deter similar violations of ERISA. This Court is not allowing ERISA to fulfil its most basic function.

To adequately protect aggrieved plan participants, the Court should consider some monetary civil penalty as a remedy which can be both easily administered by a trial court and is not unduly burdensome to employers. A per diem civil penalty like that of ERISA §502(c)(1) [29 USC §1132(c)(1)] meets these two criteria. A per diem penalty also provides deterrence to other potential violations of ERISA and restores the balance for protection of aggrieved plan participants, especially when there is only a unreasonable denial or delay in the processing of the participant's benefit. By stretching the existing statutory authority, some District Courts are already imposing monetary civil penalties for ERISA violations which once would have been thought suitable for extracontractual damages. The seal of approval from this Court on monetary civil penalties would also satisfy the Congressional concern for more *"vigilant and aggressive pursuit of violations."*

On remand, the Court should suggest that the Texas courts consider a per diem civil penalty if it preempts McClendon's state law claim and also rejects the reasoning of *Amos*, *Vogel*, and *McRae*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on or before May 31, 1990, 3 copies each of the foregoing brief, were mailed, postage prepaid, to:

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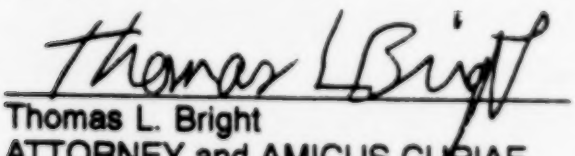

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